

# 1 ‘Plausible and audacious frauds’

## The theatre of imperial politics and reform

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Within days of one another in the winter of 1823, two men disembarked at the port of Cape Town. Having narrowly avoided shipwreck after the *Lady Campbell* lost a rudder crossing the Bay of Biscay, John Thomas Bigge arrived on 12 July, accompanied by his fellow commissioner, William Colebrooke. Governor Lord Charles Somerset welcomed Bigge warmly and immediately offered rooms in Government House as his headquarters. Bigge would soon move from these, writing confidentially to the Colonial Office in London that the location might intimidate those who came to give testimony critical of the Cape administration.<sup>1</sup> Bigge’s investigations in Australia a few years before had seen increasingly bitter divisions between the commissioner and Governor Lachlan Macquarie. At the Cape, personal relations between the commissioners (Bigge particularly) and Somerset would remain surprisingly cordial.<sup>2</sup> Shifting the location of the Commission’s activities was nevertheless symbolic. The colony was about to enter into an increasingly vexatious state of divided authority. An administration already riven by internal division and attracting growing external criticism would be pushed to breaking point as deeply divided political interests sought opportunities to gain

Report by Robert Hay (14 Oct. 1830) to Sir George Murray on despatch from Darling, 23 Nov. 1829, TNA, CO 201/203.

<sup>1</sup> Bigge to Wilmot Horton, 25 Sept. 1823 (private and confidential), Catton Collection, Derbyshire Record Office, D3155/WH 2751. The letter is eloquent on the need to keep the provision of official documents to the Commission independent of the governor as well as of the importance of negotiating the shoals of factionalism in the Cape administration.

<sup>2</sup> The Commission of Eastern Inquiry was effectively put in place to dismantle the system by which Somerset governed. Yet this did not stop Somerset both calling on Bigge’s legal advice and confiding in him to an often startlingly candid degree. Somerset and Bigge engaged in an extensive private correspondence during the latter’s absences from Cape Town. Although we have only the governor’s side by which to judge, the letters suggest that friendly relations existed between them throughout the Edwards controversies. Bigge–Somerset correspondence, MSS Afr, series 24, Bodleian Library, Rhodes House, University of Oxford.

the upper hand. As those in the Australian colonies had already discovered, 'the Commissioner of Inquiry came amongst us as an Angel of Discord.'<sup>3</sup>

Five days before the Commission's arrival, a man who would play an increasingly central role in this upheaval slipped into the colony with far less fanfare. Hailing from Mauritius, the English brig *Hero* arrived with a cargo of sugar, rum and coffee, plus a passenger calling himself William Edwards. It was common knowledge that the Commission was charged with investigations that all expected would see a comprehensive overhaul of Cape officialdom. From the highest official to the most marginalised slave, its arrival presented possibilities of all kinds. There was the hope of circumventing the established chains of authority by appealing directly to British officials in the metropole. There was the chance of directing policy and influencing public opinion in the mother country. More prosaically, with years and years of paperwork ahead of it, the arrival of the Commission raised hopes of clerical employment. Three days after Bigge's arrival, the commissioner received a letter from William Edwards, detailing his past history and asking for a job as a 'copying clerk'.

In the yarn that Edwards spun for the commissioners, he claimed to have held 'the situation of English clerk to the Resident of Java'. He admitted spending time in New South Wales (and alluded to seeing Bigge during the commissioner's time there), but in this version of his story he had been 'obliged by ill health' to travel from Java to Sydney in 1820 'in order to avail myself of a better climate and the assistance of your [Bigge's] friend Dr Bowman'. A relapse later prompted him to leave Java for Mauritius, where he was employed in the offices of the British administration. Recurrent bouts of 'Java fever' led him eventually to abandon Mauritius for the more temperate climate of the Cape. There he hoped to remain, finding in the colonies a not-uncommon solution to loss of caste: 'I would not return to England (from a reluctance to live in a humble situation amongst my early associates) if I could obtain employment to eke out a decent living here with a small annuity I possess at home'. Having justified his claim to employment on the basis of the 'character' he had earned in Java and Mauritius, 'a solicitousness whilst here to have an honest occupation; and a full reliance that you will never find me unworthy of the favor', he ended by asserting his genteel social credentials:

<sup>3</sup> Edward Eager to Wilmot Horton, 12 Nov. 1822, quoted in J. Ritchie, *Punishment and Profit: The Reports of Commissioner John Bigge on the Colonies of New South Wales and Van Diemen's Land 1822–1823 ~ Their Origins, Nature and Significance* (Melbourne: Heinemann, 1970), p. 105.

My Father being a Captain in a Regiment of Dragoons, and my Mother a relative of Mrs Burton the Lady of General Christie Burton formerly the Member for Beverley nothing but a want of economy earlier in life could have reduced me to the necessity of thus supporting myself by the labour of my hands.<sup>4</sup>

Two weeks later Edwards wrote again, this time to the commissioners' secretary, enclosing several letters intended to prove the legitimacy of his connections in Mauritius where (as the commissioners later received independent confirmation) he had indeed worked as a clerk.<sup>5</sup> Edwards later explained that he had left Mauritius for the Cape upon hearing that the Commission of Eastern Inquiry was due to arrive there. Much of the information he would give to authorities, for obvious reasons, was false: this, however, seems plausible. Given both his legal expertise and his experience working on the fringes of colonial administration, it was not unreasonable that he hoped to find work with them.

We know about the existence of these job requests because copies are to be found enclosed in a letter written almost exactly a year later (14 July 1824) from Bigge and Colebrooke to Secretary of State Lord Bathurst. By this time the obscure would-be copying clerk William Edwards had become arguably the most notorious man in the Cape Colony and a significant source of concern for the Colonial Office in London. Seeking as much information as could be gleaned about his mysterious background, what were once banal requests for employment soon gained new importance for the authorities in Britain, the Cape and New South Wales. Accordingly these copies arrived at the Colonial Office with marginalia ('I have no recollection of having seen Mr Edwards, during my residence in New South Wales. J. T. Bigge.');

they were followed by copies of the two letters to Governor Somerset for which Edwards had been recently been sentenced to transportation for criminal libel; and they were proceeded by a lengthy report.

### **'Bred to the Law'**

How had Alexander Kaye, the man transported in 1819 for stealing a chestnut gelding, really come to turn up at the Cape some four years later as the notary William Edwards? In the 1820s the authorities' interest in this question was precisely defined. For their purposes it was necessary to prove only that Kaye and Edwards were one and the same. Having done

<sup>4</sup> William Edwards to Bigge, 15 July 1823, encl. in Colebrooke and Bigge to Bathurst, 14 July 1824, Bathurst Papers, BL, 57/87, no. 6.

<sup>5</sup> Bigge, Colebrooke and Blair to Hay, 14 July 1827, *RCC*, vol. 32, p. 199.

so, they had no further investment in the matter.<sup>6</sup> Since then, scholars have shown scant interest in investigating Kaye's past.<sup>7</sup> Yet it remains significant. Like the commissioners and the secretary of state, we need to track (as far as we are able) the journey that the one had taken into the life of the other. If I have argued that Edwards has proved difficult to fit into existing historical explanations of imperial policy and reform, then one reason emerges by examining his life prior to his sentence of transportation to New South Wales.

Baptised on 29 May 1791, Alexander Kaye was the second child and eldest son of Margaret and Thomas Kaye of Bolton, Lancashire. He was given the second Christian name of Loe to honour his mother's wealthy aunt, Margaret Loe. And so began, perhaps fittingly for a man determined to keep his origins mysterious, more than two centuries of confusion. In convict records, newspaper accounts and later in the writings of historians, Alexander Loe Kaye appears in the guise of Lockaye, Lookaye, Lockage, Lukay, and Loo Kaye, to name but five of the variants on his surname. His actual surname, Kaye, is the exception rather than the rule in both the primary sources and the secondary literature, perhaps because Alexander lent himself distinction by customarily including his second name in his signature and always referring to himself as 'Loe Kaye'. Margaret Loe thus unwittingly muddied the archival waters of her grand-nephew's life, but we also have reason to be grateful to her. Her decision to leave money to Alexander Kaye's family, and in particular the lengthy case in Chancery that resulted from disputes over this legacy, give us our most detailed look into his family background.<sup>8</sup> Like the famous case in Charles Dickens's novel *Bleak House*, wrangling in the case of *Kaye v. Folds* rumbled on interminably. What concerns us here are less the legal machinations than the unwitting light that the documents it assembled shed on the relationships within the fractured Kaye household.

As well as acting as an attorney and, from 1796, a money-scrivener (part notary, part investment manager), in the 1790s Thomas Kaye was involved in extensive property speculation. By 1808 the marriage between

<sup>6</sup> Although I outline the key events here, the investigations that authorities made to prove this dual identity (and the rebuttals attempted by Kaye/Edwards) are discussed extensively in Chapter 9.

<sup>7</sup> Here I must pay grateful tribute to the meticulous sleuthing and to the generosity of Peter Burbidge of the School of Law, University of Westminster, a direct descendant of Alexander Loe Kaye. Most of the following discussion of Kaye's English background is based either directly upon his as-yet-unpublished research or upon following up his suggestions.

<sup>8</sup> The following discussion is based on *Kaye v. Folds*, in Records of the Chancery Court, Palatinate of Lancaster: Chancery Court: Pleadings, Miscellanea, TNA, PL 14/84.

Margaret and Thomas Kaye had broken down, and the couple separated. Four years later Thomas was declared bankrupt and also suffered a period of imprisonment when he refused to cooperate with the proceedings. In 1815 Margaret Kaye swore an affidavit before the Chancery Court that ‘she receives no Support whatever from her husband who lives separate [sic] and apart from her neither does he contribute to the maintenance and support of her family who are maintained by this deponent’. The following year Alexander’s sister Mary (his elder by two years) wrote to lawyer Thomas Shuttleworth about her mother’s difficulties in relation to securing the interest from Margaret Loe’s legacy held in trust. Her letter speaks eloquently of estrangement between what Mary evidently considered two halves of her family: The virtuous half (herself, her mother, her brothers Thomas and Charles and the younger siblings) and the vicious half (her father and her twenty-five-year-old eldest brother Alexander Loe Kaye). ‘Perhaps Sir’, she wrote to Shuttleworth, ‘you are not aware that having given up all intercourse with the unworthy members of my family, *that sum trifling as it is*, is all that my mother and her 3 young children have to exist upon’. Mary sought to protect her mother from a degree of poverty ‘which might be a means of making her return to her unworthy husband, and by so doing not only ruin the principles of her young children, but banish for ever all hope of respectability for them’.<sup>9</sup>

Mary’s younger brother Thomas Kaye had joined the 103rd Foot and died a soldier’s death at Fort Erie, Canada, in the British–American War in 1814. Charles Kaye (born 1797) was safely training for the law. Alexander, however, had already cast himself beyond the pale in Mary’s view:

Viewing as I do the conduct of my father & eldest brother with disgust & abhorrence is it to be wondered at that I almost rejoice in the *honorable* death of one brother and exert every nerve to prevent the other 3 and my *sister*, having the smallest contact with them, you Sir I am sure as an honourable man & a Gentleman will do all in your power to save them being driven to the necessity of seeking refuge with their unhappy father, who would in all probability teach them to follow *his own* and his son Alexander’s example – whereas if they are kept apart from him, they may become, as well as their brother Charles *honest* & respectable members of society.<sup>10</sup>

Mary did not stipulate exactly why Alexander and his father were held in such poor regard by the self-declared ‘*honest* & respectable’ members of his family. The 1812 bankruptcy and associated imprisonment of

<sup>9</sup> Mary Kaye to Thomas Shuttleworth, 17 Feb. 1816 TNA, PL 14/84, original emphasis.

<sup>10</sup> Mary Kaye to Thomas Shuttleworth, 17 Feb. 1816, original emphasis.

Thomas Kaye, which swept away the family's financial security, are the most likely sources of her resentment.

Alexander had begun his training for the law as an articled clerk to Samuel Humphreys, who acted as Margaret Kaye's solicitor and also was deputy prothonotary (principal clerk of the Court) at Chester. In 1812 Kaye relinquished these articles, and they were taken up instead by his brother Charles. Alexander apparently saw more prospects in small-time banking in Flint, North Wales. He held licenses for the Flint Bank between 1812 and 1814 and, as Kaye & Co., for the Flintshire Bank from 1814 to 1815.<sup>11</sup> Later reports of his trial emphasised 'the strange vicissitude of fortune: not many years ago, Mr Kay was living in considerable repute, as a banker and a merchant, at Flint, in North Wales; and at one time, many thousands of his notes were in circulation'.<sup>12</sup> On 6 May 1811, Alexander, then still resident in Chester, married Susanna Shackfield. The groom was barely 20, the bride three years older. Her father, Edward Shackfield, was a substantial landowner in Flint, and Alexander and Susanna's first three children would be born there.

In the period of two decades that separated the death of Margaret Loe in 1805 and the winding up of the trust in 1826, the expectation of the legacy would be used as security by the Kaye siblings amongst themselves and with others. Each could expect the substantial sum of £500, increased by interest. Charles Kaye borrowed against it from his eldest sister Mary, probably in order to fund his legal training in London (where he moved after a year with Humphreys in Chester). The investment justified the faith of both parties, for Charles became a successful solicitor, just as his sister had predicted in her 1816 letter to Shuttleworth.

Alexander, however, used the security for much less responsible purposes. By 1815 he, Susannah and their young family were also in London, with Alexander writing to Shuttleworth concerning the Loe inheritance from '3 Middle Temple Buildings'.<sup>13</sup> Although the address, apparently in the heart of the barristers' Inns of Court, carries the aura of legal prestige, it may actually have had no basis in reality.<sup>14</sup> By means of an indenture dated 24 April 1816, Alexander signed over his share in the inheritance to Charles Goldsmith, a coffeehouse keeper in Blackfriars, London, probably in lieu of paying his debts. At this time Alexander was

<sup>11</sup> R. Outing, *The Standard Catalogue of the Provincial Banknotes of England and Wales* (Honiton, UK: Token Publishing, 2010). My thanks to Peter Burbidge for this reference.

<sup>12</sup> *Hull Packet and Original Weekly Commercial, Literary and General Advertiser*, 27 April 1819.

<sup>13</sup> Alexander Loe Kaye to Shuttleworth, 24 Oct. 1815. TNA, PL 14/84.

<sup>14</sup> Peter Burbidge, a genuine member of the Middle Temple (unlike his less-respectable ancestor) has tried and failed to locate the address through the organisation's records.

practising as a solicitor (despite his incomplete qualifications) and meeting his clients at Goldsmith’s establishment, the York Hotel. Goldsmith, in turn, used the prospective legacy to pay off William Charouneau, a Marylebone silversmith.<sup>15</sup>

Relations between Kaye and his in-laws, if they had ever been good, may have soured by the time the family lived in London. When the couple had married in 1811, Kaye had seemed to have prospects in the law. He had abandoned these a year later for a brief career as a small-time banker. This failed when it became caught up in his father’s bankruptcy proceedings. He had even spent a few weeks in King’s Bench Prison in November 1816 as the result of a dispute over a fuel bill. In September 1817 Kaye’s father-in-law Edward Shackfield drew up a will that explicitly left his property in trust to his daughter Susannah ‘for her own sole and separate use and benefit without being in any manner subject to the control, debts or engagements of her husband’.<sup>16</sup> Alexander was thereby specifically excluded from any access to the inheritance. This means of protecting a married woman’s property had also been employed in Margaret Loe’s bequests to Margaret Kaye, from which Alexander’s father Thomas was similarly excluded. Edward Shackfield’s decision to ensure his daughter’s financial security followed the birth of his grandson, Edward Shackfield Kaye, in July 1817. Alexander’s precarious financial situation was probably also significant. Sadly, the child would be dead within six months, and grief may have been yet another factor in Alexander Loe Kaye’s downfall.

On 31 March 1819, at the Gloucester Lent Assizes, Alexander Loe Kaye was convicted of stealing a chestnut gelding worth £30 from ‘Thomas Evans . . . Gentleman’ in the nearby village of Deerhurst on the river Severn.<sup>17</sup> The chair of the bench of judges was the famous law reformer William Garrow. The president of the grand jury that indicted him was Lord Edward Somerset, brother to Lord Charles Somerset, Cape governor, the man who would find himself locked in conflict with the crusading notary calling himself William Edwards five years later. In a taste of things to come, Kaye appeared within the court records as ‘Alexander Loo Kaye . . . otherwise called Alexander Lowe Kaye otherwise called Alexander Kaye’.<sup>18</sup> The trial marked the culmination of a series of run-ins with the law in the preceding months, for Kaye had

<sup>15</sup> Indenture on Alexander Loe Kaye share, 24 April 1816, enclosed in Newcomb to Shuttleworth, 24 April 1816, TNA, PL 14/84. Charouneau never appeared to claim his debt, and the money eventually went to Susannah Kaye and her children.

<sup>16</sup> Welsh Probate Records, Parish of Flint, Flintshire, Diocese of St Asaph, National Library of Wales, SA/1820/39.

<sup>17</sup> Gloucester Archives, Gaol Calendar, Q/Gc 5/2.

<sup>18</sup> Office copy of Alexander Loe Kaye’s conviction, 31 March 1819. TNA, PL 14/84.

also been indicted for an alleged assault against one Robert Collier on 9 October 1818 at Cheltenham. He was committed for trial in the Michaelmas Assizes in late 1818, but because he was subsequently arrested for stealing Evans's horse the charges of assault were never pursued. The Gloucestershire Gaol Calendar also notes the charge of having 'in the month of Dec[ember] last feloniously stolen and driven away a gig of the value of £30 the property of . . . Thomas Hughes', a 'porter merchant' of Cheltenham.<sup>19</sup> This charge was also never tried, perhaps because the theft of the chestnut gelding was the easiest to prove and, as a capital offence, carried the heaviest penalty.

The *Times* newspaper reported that the case had 'excited considerable interest in Cheltenham and its vicinity'. According to its report, Kaye obtained a chestnut horse from Evans in November 1818 'on condition of returning or paying for it the same evening'. Neither the money nor the horse was forthcoming. A few days later Kaye sent a draft to Evans drawn on the firm of 'John Birnie and Co. of London', but no such firm was found to exist. Evans traced his horse to Oxford, where Kaye had sold it to a dealer.<sup>20</sup> The *Gloucester Journal* described Kaye as 'a very gentlemanly respectable looking young man' who 'conducted his own defense'. Anticipating his later dramatic performances in colonial courts, he 'cross-examined the prosecutor for upwards of two hours without being able however to invalidate that gentleman's testimony in the smallest degree'. Although the paper noted that Kaye had served a clerkship to a respectable attorney in Chester, 'we entertain some doubts whether this case would have borne a better complexion with the jury had he employed counsel or submitted himself to the humane interposition of the judge'.<sup>21</sup> He seems not to have learnt this lesson, as choosing to represent himself in court would prove to be Kaye/Edwards's undoing more than once in the future. Having been found guilty, the death sentence, according to the *Times*,

was received by the Court with evident symptoms of surprise. The prisoner, a young man of prepossessing appearance and peculiarly fascinating manners, had also to boast of a liberal education, and was endowed by nature with talents of a very superior order. In the early years of his life he was articled to an attorney. Whatever property he possessed was early dissipated, and for the last eight or ten years he has lived by sheer contrivance and his wits.<sup>22</sup>

<sup>19</sup> Quarter Sessions Indictment Book 1808–1819, Gloucester Archives, Q/SIB 3; Quarter Sessions Indictment Rolls, Q/SI (a), 1818 D; Gaol Calendar, Q/Gc 5/2.

<sup>20</sup> *Times*, 14 April 1819. <sup>21</sup> *Gloucester Journal*, 2 April 1819.

<sup>22</sup> *Times*, 14 April 1819.



Capital sentences such as Kaye’s (unlike those for murder) were mostly commuted to transportation in this period. Petitions for mercy might sway judicial recommendations, but no record of any petition on Kaye’s behalf has been traced. Nor do we know whether he had any contact with his family in England after he was transported to New South Wales. There are curious anomalies in the Chancery investigations into the Loe inheritance in the years that followed. Everyone, from the attorney general down to his own wife and family, repeatedly testified, quite wrongly, that Alexander Loe Kaye had been sent to Van Diemen’s Land. Does this suggest that no contact was maintained by either Susannah or the Kaye family? Certainly once he escaped and took on the identity of William Edwards it was imperative that Alexander break any traceable connection with this previous life in order to maintain his new role.

### Kaye becomes Edwards

Alexander Kaye embarked upon the convict transport *Atlas* bound for Sydney in May 1819. According to the ship surgeon’s journal, the voyage to Sydney was largely uneventful until 23 June, when plans for a mutiny were uncovered, and a familiar name makes an appearance:

At 10 00 P.M. several of the Prisoners were overheard laying plans for taking the Ship. Two were Handcuffed for being found out of bed. At 10 00 P M Punished Alex<sup>r</sup> L. Kaye, Edward Mills, and Jn<sup>o</sup> White Prisoners with one dozen lashes each for having broke through the Prison into the Hospital, and having two Steel Saws in their possession.<sup>23</sup>

The surgeon made no further comment on this bald entry, and it is to be assumed that the affair was neatly nipped in the bud.<sup>24</sup>

Kaye arrived in Sydney on the *Atlas* in October 1819. His conduct on the voyage out saw him immediately sent by Governor Macquarie to Newcastle for twelve months, a penal settlement then being used as an ad hoc site of secondary punishment.<sup>25</sup> An account later provided by William Hutchinson (principal superintendent of convicts in 1819) presents an image of a persistent troublemaker: Kaye was ‘received from

<sup>23</sup> *Atlas* surgeon’s journal, TNA, ADM 101/6/2.

<sup>24</sup> As the research of Hamish Maxwell-Stewart into convict mutiny attempts shows, such incidents were far more common and had a far greater impact on convict management techniques than their almost total absence of success would suggest: “Those lads contrived a plan”: Attempts at mutiny on Australia-bound convict vessels’, *International Review of Social History*, 58 (2013), 177–96.

<sup>25</sup> L. Ford and D. A. Roberts, ‘Legal change, convict activism and the reform of penal relocation in colonial New South Wales: The Port Macquarie penal settlement 1822–1826’, *Australian Historical Studies*, 46: 2 (2015), 174–91.

Newcastle with a bad Character on the 26 February 1821, and employed at Head Quarters as an Overseer of light workers, in consequence of having received a hurt while at the penal Settlement'. He did no better in this role, but 'abused the confidence reposed in him, in consequence of which he was dismissed and put to work in a labouring gang'. Subsequently Kaye was assigned to the solicitor Thomas Wylde, father of the colony's judge advocate, Sir John Wylde, the man who would later preside over a reformed Cape judiciary as chief justice. It was 'generally believed', wrote Hutchinson, that Kaye had robbed Thomas Wylde before absconding. What was certain is that he was 'advertised accordingly in the *Sydney Gazette* as a Runaway on the 8th December 1821'. A postscript to Hutchinson's letter noted 'This Said Alexander Lockaye appears to have been the cause of several of the better Class of convicts having been sent to this Country, having connected himself with them in England'.<sup>26</sup>

By 1825, when this information was transmitted to the secretary of state, Lord Bathurst, the man in Hutchinson's narrative had made himself widely notorious. How much of this later history retrospectively coloured the authorities' account of Kaye's time in New South Wales between 1819 and 1821 is therefore difficult to quantify. In this regard, Hutchinson's postscript is particularly interesting, for although the movements of Kaye within the convict system of New South Wales can indeed be verified, his alleged role in broader associations of 'elite' criminality is mere supposition. The postscript speaks to the broader concerns about 'gentleman convicts' that are explored in the final chapter of this book. Whether it has any basis in fact is more doubtful in the absence of any corroborating records. It may well tell us more about Edwards and attitudes towards him in 1824 and 1825 than it does about Kaye's time in New South Wales between 1819 and 1821.

Thomas Wylde died on 4 December 1821, his death listed in the same issue of the *Sydney Gazette* that advertised 'Alexander Lookaye' amongst a long list of 'Prisoners having absented themselves from their respective Employments, and some of them at large with false Certificates'. Principal Superintendent Hutchinson warned in the notice that 'Any Persons harbouring, concealing, or maintaining any of the said Absentees, will be prosecuted for the Offence'.<sup>27</sup> The same issue noted the departure on Wednesday 5 December of the *Jane* for Batavia. The brig had been in

<sup>26</sup> Somerset to Bathurst, 27 Aug. 1825, incl. letters from T. Ovens and W. Hutchinson, 20 Nov. 1824, *RCC*, vol. 23, pp. 24–6.

<sup>27</sup> *Sydney Gazette*, 8 Dec. 1821.

Sydney since October, arriving from Batavia via Hobart with a cargo of rum and gin.<sup>28</sup>

Although we do not know for certain that Kaye escaped on board the *Jane*, he did (as we have seen) admit to time in Batavia (Java), and the route was a logical one for an escaping convict to take. As the work of Clare Anderson suggests, Sydney was essentially a hub on the Indian Ocean shipping network that connected the east coast of Australia to Europe.<sup>29</sup> Until recently, the emphasis in convict escape historiography has been mostly on dramatic group escapes (such as that of Mary Bryant and family in a cutter stolen from Governor Arthur Phillip in 1791) and on the oft-repeated stories of convicts trying to escape overland through the Australian bush to China.<sup>30</sup> In fact, individual escapes by sea were more the norm and more common than the regulations to prevent them might lead one to expect.

From the very beginning of the convict settlement, it was recognised that the penal settlement's isolation would be continually undercut by the existence of an expanding maritime world. Governor Phillip's instructions banned colonial boat building and contact with Asian settlements.<sup>31</sup> Yet persistent local regulations regarding boats proved largely unworkable.<sup>32</sup> Bigge's 1822 report on New South Wales noted frequent escapes, 'often with the connivance of sailors'.<sup>33</sup> His report on the judicial establishments recommended that more regulations were required to prevent the escape of convicts in ships because such practices were increasing with the increase of trade in the colony.<sup>34</sup>

Bigge's report noted the precautions required at the departure of every vessel, precautions that Kaye evidently evaded. All those taking passage

<sup>28</sup> *Hobart Town Gazette*, 6 Oct. 1821; *Sydney Gazette*, 27 Oct. 1821; *Bataviasche Courant*, 2 and 9 June 1821, 28 July 1821, 23 Feb. 1822, 2 and 9 March 1822.

<sup>29</sup> C. Anderson, 'Multiple border crossings: 'Convicts and other persons escaped from Botany Bay and residing in Calcutta'', *Journal of Australian Colonial History* 3:2 (2001), 1–22.

<sup>30</sup> W. Hirst, *Great Convict Escapes in Colonial Australia*, rev. edn (Sydney: Kangaroo Press, 2003); D. Levell, *Tour to Hell: Convict Australia's Great Escape Myths* (Brisbane: University of Queensland Press, 2008); G. Karskens provides a historiographical survey in a special issue on convict escapes: "'This spirit of emigration': The nature and meanings of escape in early New South Wales', *Journal of Australian Colonial History*, 7 (2005), 1–34.

<sup>31</sup> C. McCreery and K. McKenzie, 'The Australian colonies in a maritime world', in A. Bashford and S. Macintyre (eds.), *Cambridge History of Australia* (Cambridge University Press, 2013), vol. I, p. 561.

<sup>32</sup> Karskens, "'This spirit of emigration'", p. 30.

<sup>33</sup> *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales*, 1822, p. 33.

<sup>34</sup> *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land*, 1823, p. 79.

on a vessel apart from the crew were required to obtain certificates from the judge advocate's office, in part to prove that they were not attempting to escape outstanding debts in the colony. Their names, ages and places of abode were all recorded at the secretary's office. If previously a convict, records of pardon must be checked. All of this took time and presented considerable inconvenience as sailors took the opportunity to abscond either temporarily or permanently. Ships leaving the harbour were searched by the chief constable, and if any suspicion existed of convicts being concealed on board, the vessel was smoked with brimstone.<sup>35</sup> Any stowaways were thereby forced to reveal themselves or risk suffocation.

To stop convicts from joining vessels under weigh, the ships were required to proceed straight out of the heads, unless in cases of 'necessity or of stress of weather'. But in many cases this proved not practicable so that government vessels with constables on board were usually ordered to accompany outward-bound ships and to remain near them until they had cleared the harbour. Preventing convict escape by sea was perceived to have a serious negative impact on the conduct of colonial commerce. Deputy Judge Advocate Bent compared the 'peculiar circumstances' of port regulations in the colony in respect to the escape of convicts 'to His Majesty's plantations in the West Indies in respect to the escape of their Negroes'.<sup>36</sup> In his testimony to Bigge, Superintendent of Convicts William Hutchinson agreed that the captains of merchant vessels complained of the 'restraints and regulations necessary to prevent the concealment of convicts on board their ships' and that 'they object strongly to the smoking their ships or any minute search of them'.<sup>37</sup>

Evading these precautions was clearly more than possible, making convict escape by sea a significant problem for the authorities. By Bigge's calculation (and he admitted that this was likely the tip of the iceberg), 255 convicts had attempted to escape between 1803 and 1820 by concealing themselves on board vessels or attempting to seize ships by violence. Of these, he claimed, 194 had been retaken and 9 had died. 'Their usual object in making escape is to land in India; or, in taking possession of vessels, to make their passage to Timor or Batavia'.<sup>38</sup> Clare Anderson's work on convicts who escaped Australia for India underlines the broader Indian Ocean context in which these individual acts, and official response to them, should be analysed. Escaping convicts not only eroded

<sup>35</sup> Bigge, *Judicial Establishments*, p. 79.      <sup>36</sup> *HRA*, 4:1, p. 123.

<sup>37</sup> Attempted and actual escapes from settlement in NSW, Evidence of William Hutchinson, 10 Nov. 1819, State Library of New South Wales, Bonwick Transcripts, BOX 1, pp. 161–6.

<sup>38</sup> Bigge, *Judicial Establishments*, p. 79.

legal and punishment regimes; their presence in non-settler colonies like Bengal and Mauritius also challenged local definitions of respectability and racial hierarchy.<sup>39</sup>

As a convict who successfully escaped and changed his identity, therefore, Alexander Kaye was hardly unusual. It was his subsequent activities that set him apart. When Kaye arrived in Cape Town in 1823, there was nothing in his story thus far to suggest that this heralded a career as a political activist or colonial reformer. His emergence as such is far more difficult to explain than his transformation into the notary William Edwards.

In October 1830, two years after the death of the man who called himself William Edwards, Undersecretary of State Robert Hay sat down to pen what would be the Colonial Office's last substantive word on this troublesome subject. Those who had never lived in a 'convict settlement', Hay wrote, could not even 'imagine the possibility of such plausible and audacious frauds as are daily practised there'. In his rich career of duplicity and imposture, Edwards ranked as a consummate performer even within 'that strange system of artifice'. It was indeed a pity, commented Hay, 'that a man possessing so much dramatic power should not have used it to a better purpose'.<sup>40</sup>

Even with his jaundiced view of penal colonies, Hay was clearly baffled by the enigma presented by William Edwards. We might similarly ask why Edwards chose to challenge corrupt behaviour on the part of the Cape authorities, particularly in circumstances in which, as an escaped convict, it might have been more prudent to lay low. Can we find some kind of answer in his background? There is nothing to suggest that he or any of his connections had links to reformist politics. No clues exist to suggest that he might fit within recent scholarly accounts that have uncovered the networks that Britain's radical underworld extended into the colonial world in this period.<sup>41</sup> As I argue in later chapters, suggestions made by those who knew him that Edwards was insane cannot easily be discounted, but are equally hard to assess. He persistently resists categorisation, one reason why his activities have been so difficult to incorporate properly into existing understandings of imperial reform. Whatever the political views he expressed in the colonies (and this is not to argue that they

<sup>39</sup> Anderson, 'Multiple border crossings'; *Subaltern Lives: Biographies of Colonialism in the Indian Ocean World 1790–1920* (Cambridge University Press, 2012).

<sup>40</sup> Report by Hay (14 Oct. 1830) to Sir George Murray on despatch from Darling, 23 Nov. 1829, TNA, CO 201/203.

<sup>41</sup> J. Epstein, 'The radical underworld goes colonial: P. F. McCallum's *Travels in Trinidad*', in M. T. Davis and P. Pickering (eds.), *Unrespectable Radicals? Popular Politics in the Age of Reform* (Aldershot: Ashgate, 2008).

were insincere), Alexander Loe Kaye was not transported for any form of action against tyranny or ‘Old Corruption’. His crimes cannot be easily linked to either poverty or protest.

One theme we can trace from his previous life into his later career as an activist is his insistence on his identity as a lawyer. In the description made of Kaye at Gloucestershire Gaol, the record note ‘says he was bred to the Law’.<sup>42</sup> As a convict he ensured that ‘Solicitor’ and ‘Educated for the Bar’ were recorded under the information collected as to ‘calling’. On the *Atlas* convict transport, his native place was listed as ‘Dublin’. We can speculate that one reason for this may have been to mask his failure to qualify when he was practising in London, because credentials from Ireland would have been more difficult to check. Kaye may never have finished his legal training, but he not only practised the law but also ensured that it was listed in his convict records. This may all have had a merely pragmatic purpose, but he would make much of this identity in his contests with colonial authorities in the guise of William Edwards. His adversaries, he claimed at the Cape, should have ‘known there was something in the free, honest, unbending spirit of an English lawyer, not to be insulted with impunity’.<sup>43</sup> Supporters would take up the same image: ‘Edwards will attack them with his own weapons and conquer them by good sense and sound Law proceedings’.<sup>44</sup>

In years to come it would also be reported to authorities in Cape Town that William Edwards had boasted that

money is no object to me. I have been at Van Diemen’s Land where I kicked up a rough; at the Isle of France [Mauritius], where I did the same & from thence I came to the Cape; which after I have set in fire, Shall leave for another place, to start a similar agitation.<sup>45</sup>

As we shall see, this information came from a paid informer against Edwards and a man who was widely regarded as an unreliable witness. We must also recognise the hyperbole to which Edwards undoubtedly was prone. If Edwards indeed made these claims, then he did so in the context of a self-reinvention that I chart over the following chapters. Tempting as it might be to see him as setting out on his travels in the role of global revolutionary, the reality was undoubtedly more complex.

How are we to understand the peculiarities of the theatre upon which Edwards was able to exert such ‘dramatic power’? Edwards’s insistence

<sup>42</sup> Gaol Calendar, Gloucester Archives, Q/Gc 5/2.      <sup>43</sup> *RCC*, vol. 17, p. 185.

<sup>44</sup> Hudson, Diary, 30 April 1824.

<sup>45</sup> Testimony of Daniel Shee, CA, CJ 3352, Inquiry into Placard scandal, 1824, 222.

upon his legal credentials, like his attempt to find work with the Commission of Eastern Inquiry, is emblematic of the broader transition in imperial governance with which this book is concerned. In the rest of this chapter I seek to lay a path for the reader through the entangled problems that bound together the three contexts within which Edwards's drama played out. Only by demonstrating the connections in imperial policy and reform that existed amongst Britain, the Cape and the Australian colonies can we understand why Edwards and his challenges to authority were able to secure the far-reaching impact that they did.

If imperial governance was transformed in the period following the Napoleonic Wars, then the key institutional mechanism for achieving this was an intensive phase of parliamentary Commissions of Inquiry. Tracking their investigations and the consequences that flowed from them is a key path towards understanding how the colonial order was recast in this period. For the Cape and the Australian colonies the relevant investigations are those associated with John Thomas Bigge in the 1820s, enquiries that Edwards's own travels would mimic in almost uncanny ways. Bigge was sent out first to the Australian colonies (1819–1821) and later, together with William Colebrooke, to the Cape (1823–1826). Edwards, however, first came to prominence in imperial debate at the Cape, only later making his mark in New South Wales. Because it is Edwards' political trajectory that I follow in *Imperial Underworld*, I deal with the commissioners' investigations in reverse order here.

### **Cape of Torments: Reforming a Dutch colony<sup>46</sup>**

When Edwards arrived at the Cape in 1823, he joined an improbably eccentric cast of characters that was headed by the governor himself. Second son of the fifth duke of Beaufort, with his colourful background (direct descent from the Plantagenets, a scandalous elopement from a masked ball), his autocratic rages, his passion for the hunt and for horse racing, and his tendency to treat the Cape like a private fiefdom, Somerset [Figure 2] can easily approach caricature. Perhaps unsurprisingly, this highest of high Tories remains one of the few British colonial administrators to live on in popular memory in South Africa.<sup>47</sup> His time at the

<sup>46</sup> The phrase *Cabo das Tormentas* (Cape of Storms) was used by the Portuguese explorers in the fifteenth century. Amongst the foundational histories of Cape slavery is that of R. Ross, *Cape of Torments: Slavery and Resistance in South Africa* (London: Routledge, 1983).

<sup>47</sup> K. Millar, *Plantagenet in South Africa: Lord Charles Somerset* (Oxford University Press, 1965), p. 1. Millar's book is an overt, unapologetic (and largely unsuccessful) attempt to 'rehabilitate his subject': see J. Butler's 'Review of Anthony Kendal Millar, *Plantagenet in South Africa*', *American Historical Review*, 71:2 (1966), 638–9.





Figure 2 Lord Charles Somerset in 1811, three years before taking up his position as governor of the Cape Colony.

Cape spanned (with one interruption) the period from 1814 to 1826. Historians have long argued, as did contemporaries, that he was possibly the least suitable choice for the times in which he found himself. Yet if Somerset had departed the colony permanently in January 1820 (when he left for Britain on a period of home leave) he might not have become,



as one scholar has described him, 'one of the villains of South African history'.<sup>48</sup> Upon his return in November 1821, Somerset embarked upon bitter feuding with all those functionaries who had been favoured by Acting Governor Sir Rufane Donkin during his absence. The colonial secretary, Colonel Christopher Bird, was a particular target. This paranoid factionalism, which reached almost absurd heights, did much to poison Somerset's second term. He was also faced, after 1820, with a settler population that was rapidly changing its composition as an influx of new British emigrants arrived in the colony. These new arrivals were far outnumbered by the existing Cape Dutch inhabitants (and even more so by slaves and indigenous people). But they could punch above their weight in colonial disputes not only through their connections to high-status individuals in Britain itself, but also through the influence of British public opinion on parliamentary decisions.

The governor was immensely popular with the Cape Dutch elite of the colony, with whom he ironically shared far closer political and social sympathies than with most of the fellow countrymen who began arriving at the colony from 1820. He was the last of the Cape governors to possess the almost unhindered autocratic powers that were so congenial to his personality and background and so increasingly out of kilter with the spirit of the reformist age. He was obliged to play host to a Commission of Inquiry sent out to dismantle the system by which he ruled, a system whose fundamental principles of patronage and self-enrichment he had taken to with such alacrity. The growing mismatch between Somerset and the circumstances in which he was expected to rule, together with his poor handling of this situation, proved a significant liability to the Tory administration in the House of Commons and a magnet for opposition attacks.

Although the criticisms made of Somerset, even by his supporters, were for the most part richly deserved, it is hard not to accord him at least a modicum of sympathy for being the victim of bad timing. If he had taken up the same post and handled it in the same way even a decade earlier, he would have proved far less controversial.

In 1826, shortly before Somerset returned to London to answer charges against him in the House of Commons, Dudley Perceval – son of the assassinated British Prime Minister Spencer Perceval – wrote from the Cape:

a good Tory, like myself, observing that his foes are Englishmen & Radicals here, & supported by Radicals at home, will judge quite as favourably of his Character

<sup>48</sup> Butler, 'Review of *Plantagenet in South Africa*', 639.

from contemplating who they are that attack him, as from the knowledge of what part of the community are satisfied with & well disposed to him.<sup>49</sup>

In both governance and social structure, the colony where Edwards arrived in 1823 was still Dutch rather than British, for the latter had conquered it from the Dutch East India Company (Vereenigde Oostindische Compagnie [VOC]) as recently as 1795. Of those estimated to live within the colony's borders in 1820, around 43 000 were designated Europeans or 'Christians'. The vast majority of these were Cape Dutch rather than British settlers, though the census did not differentiate between them.<sup>50</sup> Over 33 000 were slaves whose ethnic heritage was mixed (including what was later known as Madagascar, India, Indonesia and Malaysia, for example), a heritage of Dutch dominance in the Indian Ocean. Some 2000 might be termed 'free blacks', including not only manumitted slaves but also those descended from political prisoners exiled from Batavia and other Dutch colonial possessions, almost entirely confined to Cape Town and increasingly forging a distinct Islamic identity there. More than 25 000 were indigenous Khoekhoen (Hottentots, as Europeans referred to them) or 'Bastaards' (those with a Khoekhoe mother and a slave father).<sup>51</sup> Nearly a quarter of the colonial population lived in Cape Town. A full half were to be found in the mere 5 per cent of the total land area of the colony that comprised the city's immediate surrounding districts. These were the areas of intensive agricultural production, particularly in wheat and wine. The rest of the inhabitants were spread out increasingly thinly towards the frontier, primarily engaged in pastoralism.<sup>52</sup>

<sup>49</sup> D. M. Perceval to Countess Bathurst, 19 Jan. 1826, D. M. Perceval, Letters written from the Cape of Good Hope 1825–1828, Library of Parliament, Cape Town, class a. 916.87, no. 9202.

<sup>50</sup> The Cape Dutch should not be equated with the metropolitan Dutch, despite their common language (at least in formal contexts). A much broader constituency of Europeans was drawn into the orbit of the Dutch East India Company over the previous century and a half. The creolised Dutch language from which Afrikaans would emerge had not yet attained respectability amongst white elites.

<sup>51</sup> The figures and categorisations are those of R. Elphick and H. Giliomee, 'The origins and entrenchment of European dominance at the Cape 1652–c. 1840', in R. Elphick and H. Giliomee (eds.), *The Shaping of South African Society 1652–1840*, 2nd edn (Cape Town: Maskew Miller Longman, 1989), p. 524. The term 'free black' was a fluid one and presents complexities of definition, particularly by the 1820s when manumissions were on the rise. It is generally employed by Cape historians to mean free persons of whole or part African (though not Khoekhoen) and Asian descent, which was roughly how it was used during the VOC (Vereenigde Oostindische Compagnie: Dutch East India Company) period. R. Elphick and R. Shell, 'Intergroup relations: Khoikhoi, settlers, slaves and free blacks, 1652–1795' in R. Elphick and H. Giliomee (eds.), *Shaping of South African Society*, p. 184.

<sup>52</sup> J. E. Mason, *Social Death and Resurrection: Slavery and Emancipation in South Africa* (University of Virginia Press, 2003), p. 17.

For reasons of financial and political expediency, an alliance had been forged between the conquering British administration and the Cape Dutch gentry, one that reached its climax under the Somerset administration. Somerset, who behaved very much as the past colonial experience of the Cape elite would lead them to expect of a ruler, had a great deal to offer. He dispensed lavish hospitality and generous patronage to those who were loyal to him. He agitated to keep the preferential access of Cape wines to the British market, a highly significant development for Cape trade and labour to which I return in Chapter 4. The Cape Dutch dominated the ranks of European colonists not only demographically, but also financially and in terms of access to power and patronage. Key posts in the administration, above all in its judicial branch, remained filled by leading members of the Cape Dutch elite who were members of (or connected by marriage to) the wealthiest families in the colony. Amongst them were many who had held office between 1803 and 1806, during the period that Britain returned the colony to the Batavian Republic under the terms of the Treaty of Amiens. Despite increasingly loud criticism of 'Old Corruption' in Britain, similar sentiments had failed to penetrate very far into Cape Dutch society or governance, which was likely one reason why Somerset felt so at home there.<sup>53</sup> At least at first, the British conquerors played entirely by the established Cape rules of patronage and reward. The price of switching loyalty, argues historian Wayne Dooling, 'probably paled in comparison with the opportunities for outright theft that continuity in office allowed the Dutch elite'.<sup>54</sup>

Amongst the men who embodied this colonial two-step were those who played important parts in the fate of William Edwards at the Cape: Johannes Andreas Truter,<sup>55</sup> a tireless supporter of Somerset and the colony's president of the Council of Justice (chief justice), and Daniel Denijssen, the last man to hold the unpopular office of fiscal. Truter

<sup>53</sup> This is not to imply that criticism of state corruption at the Cape had to await the arrival of British settlers. It was a significant theme across a series of eighteenth-century protests by Cape Dutch burghers against oligarchical rule under the VOC. The culmination of these may perhaps be seen in what has been termed 'the Cape Patriot movement' in relation to protests from 1778 and into the 1780s. Interpretations of these events have differed widely, however. Afrikaner nationalist historians saw in them a proto-Afrikaner struggle for political liberation from VOC tyranny. In more recent work, Teunis Baartman has argued convincingly that the events emerged from a dispute between rival gentry factions over political and economic advantage. As such he sees a greater degree of continuity between the late eighteenth-century protests and the periodic patronage-network disputes that preceded them across the previous century: see his 'Fighting for the spoils: Cape burgerschap and faction disputes in Cape Town in the 1770s', unpublished PhD thesis, University of Cape Town (2011).

<sup>54</sup> W. Dooling, *Slavery, Emancipation and Colonial Rule in South Africa* (Scottsville, South Africa: University of KwaZulu-Natal Press, 2007), p. 74.

<sup>55</sup> From 1820 Sir John Truter, the first South African to be knighted.

exemplified the parasitical forces of 'Old Corruption' in a Dutch colonial idiom. As president of the Orphan Chamber during the Batavian interregnum of 1803–1806,<sup>56</sup> he had lent himself and his family the vast sum of 51 000 rixdollars, a figure he knew he could never repay. But because he was also president of the Council of Justice, 'and thus empowered to deliver the final judgement on any case that might be brought against himself', he had reason to rest easy.<sup>57</sup> Somewhat akin to an attorney general, the Cape fiscal combined the duties of public prosecutor and chief of police. In a city where illegal trading was a way of life, the fiscal also prosecuted all matters of revenue and breach of customs duties.<sup>58</sup> He was arguably the most hated man in the colony, partly because one third of any fines he imposed went by law into his own pocket. As a contemporary wrote, 'The acuteness of a lawyer, whetted by a prospect of gain, and aided by the greedy watchfulness of an officer of customs, appear to be dreadful odds against a defendant'.<sup>59</sup> The office was so despised that it has lived on in the popular identification of the species *Lanius collaris*. Not only its black-and-white legal plumage but also its habit of impaling its (often-still-living) prey upon convenient thorns for later consumption has given this southern African bird the common name of fiscal shrike.

Denijssen (or Denyssen as he tended to anglicise it for the new administration) was born in Amsterdam in the late 1770s. Trained at the University of Leiden, Denyssen had been appointed to the Cape Council of Justice during the Batavian interregnum. In 1812, when the previous fiscal, Johannes Andreas Truter, was appointed president of the Council of Justice, Denyssen took on the role. As a Crown prosecutor tasked with tackling critics charged with seditious libel, Denyssen faced ridicule both inside and outside court because of his switch in loyalties, from William Edwards's rhetoric, which dubbed him one of the 'renegadoes of Amsterdam',<sup>60</sup> to scrawls on the city's walls in the guise of 'Dog Dan'. A placard posted after the fiscal had refused to fight a duel (by reason of his office) may have started the nickname:

<sup>56</sup> Between 1803 and 1806 the French-Allied Batavian Republic in the Netherlands regained control of the Cape from the British as a result of the Treaty of Amiens. The British conquered the Cape for a second time when the hostilities of the Napoleonic Wars broke out once more.

<sup>57</sup> J. B. Peires, 'The British and the Cape' in R. Elphick and H. Giliomee (eds.), *The Shaping of South African Society*, p. 491. In fact Truter would be embarrassed by one of his slaves, Marie, who made sure the matter came out during the British period. Dooling, *Slavery, Emancipation and Colonial Rule*, pp. 76–7.

<sup>58</sup> Anon. [William Wilberforce Bird], *State of the Cape of Good Hope in 1822*, facs. edn (Cape Town: Struik, 1966), pp. 16–17.

<sup>59</sup> Anon. [Bird], *State of the Cape*, p. 17.

<sup>60</sup> William Edwards to the secretary of the Court of Justice, 26 May 1824, Letters received from Court of Justice, CA, CO 214, no. 31.

Lost, stolen, or strayed, a white-livered Dog, answering to the name of 'Dan'. Whoever will bring the said dog to the African Society House, with a rope round his neck, will be well rewarded – N.B. This dog is of no use to any Sportsman, as he does not stand fire.<sup>61</sup>

As we shall see, Denysen was eager both to defend the attacks that Edwards had made on his service to the 'revolutionaries' of the Batavian Republic and to assert his loyalty to the British administration.

Denysen was a man of undoubted abilities, very far from the tyrannical buffoon that Edwards and his allies alleged. For all his professions of loyalty to the British in the face of his critics' courtroom arguments, petitions to Parliament, and scurrilous placards, he clearly saw quite another kind of writing on the wall. In 1826 he requested permission from Lord Bathurst, secretary of state for the colonies, to retire on a full pension. After protracted negotiations as to the return of a portion of the fines he had collected as fiscal, his plea was ultimately granted. Denysen retired in 1828, the year a new legal system was established at the Cape. The office of fiscal was replaced by that of attorney general, and Irishman William Porter was brought out to fill the post.

Denysen resumed the private practice of an advocate (barrister) and would later become an outspoken opponent of anglicisation. The 1830s would find him publicly urging the importance of asserting what was becoming an increasingly 'Afrikaner' (as distinct from Cape Dutch) identity.<sup>62</sup> Truter was similarly excluded from the new regime and went into retirement after being succeeded by a new chief justice, Sir John Wylde. The removal of such officials and their replacement by British equivalents was part of a wider transformation of the Cape colonial administration following the Commission of Eastern Inquiry, particularly in the realm of the law. The transformation was wide ranging, but it lagged behind the actual conquest of the colony by more than two decades, one reason for the frustration voiced by the increasing numbers of recently arrived British settlers with whom Edwards allied himself.

Somerset had come to the Cape an autocratic conservative by reason of birth and upbringing, but his natural antipathy to those he stigmatised as 'Radicals' was only exacerbated by recent events in Britain itself. The years since Waterloo had seen a series of political upheavals in which many of Somerset's class and political outlook, as well as those of more

<sup>61</sup> L. H. Meurant, *Sixty Years Ago; or Reminiscences of the Struggle for the Freedom of the Press in South Africa*, orig. publ. 1885, facs. edn (Cape Town: Africana Connoisseurs Press, 1963), p. 26.

<sup>62</sup> *Dictionary of South African Biography*, vol. III, p. 208.

moderate views, saw the sparks of revolution. The anti-machinist Luddite attacks of 1812–1815 were followed by the Spa Fields riots of 1816, the Blanketeers March and the Pentrich uprising of 1817. The 1819 ‘Peterloo’ massacre of unarmed men, women and children attending an open-air meeting at Manchester calling for parliamentary reform was succeeded the following year by the exposure of the Cato Street conspiracy to blow up the prime minister and cabinet. These represented only the most prominent moments in an all-pervading climate of class-based anxiety felt amongst the elite, an anxiety prompted by an equally class-based resentment amongst the lower orders.<sup>63</sup> It would have important implications for the thrust of reform initiatives in both colonial Australia and at the Cape.

At the Cape an urgent overhaul of the administration seemed necessary not only to bring colonial governance into line with demands for greater probity in administrative practice, but also to make the colony more attractive to British immigration. In an economy shifting under the forces of industrialisation, those who found themselves on the more precarious rungs of the gentry in Britain were to be encouraged to make homes elsewhere by various schemes of colonial emigration. These emigration initiatives played out in different ways in distinct colonial contexts. In the Australian colonies, as we shall see, they dovetailed with an overhaul of the convict system designed to combat crime rates by making transportation a greater deterrent to the criminally inclined poor. In New South Wales and Van Diemen’s Land this meant changing policies of land grants and convict assignment in order to favour free emigrants with capital over emancipated felons. The same British problems with regard to population pressure and social upheaval sought solutions at the Cape Colony in a subsidised emigration scheme that substantially increased the number of British settlers. Landing at the Cape across the first half of 1820, around 4000 people were to be established on an eastern frontier that was in the midst of heightened tension and episodic full-scale warfare with the amaXhosa.<sup>64</sup>

<sup>63</sup> The classic account remains that of E. P. Thompson, *The Making of the English Working Class* (London: Penguin, 1980), first published 1963.

<sup>64</sup> The settlers’ role as a projected ‘buffer zone’ between expanding Cape Dutch pastoralists and the amaXhosa has been much debated by South African historians. The consensus now places more emphasis on metropolitan social problems as a motivation for the emigration scheme. By contrast the establishment of a Khoekhoen farming community in the Upper Kat River Valley of the Eastern Cape from 1829 was deeply implicated in the strategies of frontier warfare. For an account of the settlement and its tragic betrayal see R. Ross, *The Borders of Race in Colonial South Africa: The Kat River Settlement, 1829–1856* (Cambridge University Press, 2014).

This group of new arrivals, who would become known as the '1820 Settlers', developed as one of the biggest thorns in Governor Somerset's flesh, though ironically he had initially promoted the idea of assisted emigration. The scheme proved an unmitigated disaster, planned as it largely had been more as a way for the Tory government in Britain to show its concern for postwar unemployment than with due regard for circumstances on the ground.<sup>65</sup> The raft of problems contributing to its failure included the ecological (infertile soil, crop diseases and natural disasters), strategic (escalating frontier warfare with the amaXhosa) and social (most settlers lacked the capital, experience or inclination to succeed as farmers). Adding to this potent mix of dissatisfaction was the fact that amongst the 1820 settlers, and amongst the increasing numbers of British emigrants arriving in the colony in general, were a number of highly articulate and well-connected Whigs and Radicals. They would prove to be significant players in the debates over colonial reform heightened by the arrival of the Commission of Eastern Inquiry in 1823.

Prominent amongst the 1820 settlers was Thomas Pringle. Poet, journalist and evangelical reformer, Pringle was a product of both the Scottish Enlightenment and of concomitant transformations in the Scottish economy that saw his extended family pushed into circumstances that were sufficiently precarious for them to join the Cape assisted emigration initiative. Having moved from the eastern frontier to Cape Town, he was quick to see a potential role for men of letters in the colony. He wrote urging his friend John Fairbairn to join him in various publication and education schemes. The advantages were not only material: 'I am projecting a magazine to enlighten South Africa'.<sup>66</sup> In 1824, Pringle, who had served as co-editor of the celebrated literary review *Blackwood's Edinburgh Magazine*, would, together with Fairbairn, a contributor to the same publication, take on the editorship of George Greig's *South African Commercial Advertiser*. A detractor would later sniff, 'I have no doubt that Mr Pringle conceived himself to be a very great Man, quite a Dr Johnson in his way, among the Cape people most of whom I take it are as well qualified to read as he may be to write'.<sup>67</sup>

Fairbairn and Pringle's editorship of the *Advertiser* was a carefully guarded secret. The public face of the paper was Greig, its printer and proprietor. The presses upon which it was produced were the property of

<sup>65</sup> Peires, 'The British and the Cape', 474–5; A. Lester, *Imperial Networks: Creating Identity in Nineteenth-Century South Africa and Britain* (London: Routledge, 2001), pp. 48–50.

<sup>66</sup> Pringle to Fairbairn, 24 November 1822, Randolph Vigne (ed), *The South African Letters of Thomas Pringle* (Cape Town: Van Riebeeck Society, 2011), p. 82.

<sup>67</sup> Lockhart to Hay, 30 Oct. 1826, Private Correspondence of Robert Hay, TNA, CO 323/144.



the London Missionary Society, lent to Greig by the recently appointed superintendent, John Philip. Fairbairn, Pringle, Philip and Greig became the centre of an increasingly vociferous group of merchants, missionaries and settlers agitating for colonial reforms at the Cape. As we have seen, they were plugged into sympathetic networks in London who could bring their case before Parliament through allied MPs such as Joseph Hume and Henry Brougham, men who were eager to attack the High Tory interests represented by Somerset. The Cape activists took up a loosely connected set of issues that frequently dovetailed with the concerns of the Commission of Eastern Inquiry to liberalise and anglicise the organisation of the colony. Over time, however, the unity of this group became irrevocably strained. All continued to support issues such as freedom of trade, freedom of the press and (with some reservations) a move towards greater responsibility in colonial government. Yet by the 1830s a growing divide had opened up between settlers and humanitarians on questions of race and issues relating to the rights of slaves and, particularly, the indigenous Khoekhoen.<sup>68</sup>

The closure of the *South African Commercial Advertiser* within months of its appearance in 1824 was occasioned by the paper's desire to report the politically sensitive libel trials of William Edwards. Amongst this nucleus of Cape reformers, therefore, Pringle, Fairbairn and Greig all play important roles in the chapters to come. Philip, however, does not, for all that he is routinely, and rightly, placed as central to understanding the lobby agitating to transform the Cape (and indeed British imperialism more generally) in this period.<sup>69</sup> If the important roles that missionaries and indigenous peoples played in the debates over imperial reform are at best a shadowy presence in this book, this is because both remain a shadowy presence in the life and activities of William Edwards. It is worth pausing to consider the reasons for this. Not only do they help us to gain a proper understanding of the complicated place that Edwards occupied within the Cape reform lobby, but they also highlight other relationships between what was a quite loosely knit group of individuals. We need to understand the Cape reformers not as a unified whole but as a series of interlocking circles of influence, some more tightly connected than others.

John Philip arrived in the colony in the wake of scandals of missionary radicalism and interracial sexual disorder at the Cape that had come to

<sup>68</sup> A. Bank, 'Liberals and their enemies: Racial ideology at the Cape of Good Hope 1820–1850', unpublished PhD thesis, University of Cambridge (1995).

<sup>69</sup> A. Lester and F. Dussart, *Colonization and the Origins of Humanitarian Governance: Protecting Aborigines across the Nineteenth-Century British Empire* (Cambridge University Press, 2014).



a head in 1817. In sending him and in appointing him the new superintendent in 1819, the London Missionary Society was seeking to rebrand itself with unimpeachable respectability.<sup>70</sup> In the decades to come, Philip would work closely with Pringle (who returned to Britain in 1826 and was later appointed secretary of the Anti-Slavery Society in London) and with Fairbairn (who would marry Philip's daughter Eliza in 1831).<sup>71</sup> Pringle also found common ground with Dutch Reformed Church minister Abraham Faure with whom he collaborated on the literary journal *The South African Journal/Het Nederduitsch Zuid-Afrikaansche Tijdschrift*. Philip, Pringle and Fairbairn were all high-minded Scottish evangelicals, and although they may have worked towards certain common aims with the printer George Greig, they were also wary of him.<sup>72</sup> If missionary allies like Pringle were extremely dubious of 'vagabonds' and 'blackguards' like Edwards,<sup>73</sup> then the same attitudes would certainly apply to Philip. Greig, on the other hand, appears far more comfortable in such company. Later we will meet him visiting Edwards in jail and laughing over scurrilous satire with a group of raffish critics of government, a scene where one cannot imagine the superintendent of the London Missionary Society.

If associating with a man such as Edwards was clearly not beneficial to Philip's agenda, the missionary also had little to offer the troublesome Cape notary. To prevail against harassment by the Somerset administration, Edwards needed both powerful metropolitan allies and the moral high ground provided by causes that were sufficiently prominent in British public debate. Although Philip would later gain significant influence in evangelical and parliamentary circles, in 1823–1824 he (and concern for the rights of indigenous peoples under British rule) had not yet achieved it. Philip left the Cape in 1826 to lobby in London, seemingly frustrated by the slow progress of the Commission of Eastern Inquiry. At first Thomas Buxton, widely regarded as the heir to William Wilberforce as the leading light of the group of evangelical reformers known as the 'Saints', repeatedly brushed him off under pressure of other concerns. Only after a protracted period of courting Buxton was Philip able to secure the necessary parliamentary alliance and influence on wider

<sup>70</sup> E. Elbourne, *Blood Ground: Colonialism, Missions, and the Contest for Christianity in the Cape Colony and Britain 1799–1853* (London: McGill-Queen's University Press, 2002), p. 233.

<sup>71</sup> K. McKenzie, 'My own mind dying within me: Eliza Fairbairn and the reinvention of colonial middle-class domesticity in Cape Town', *South African Historical Journal*, 36 (May 1997).

<sup>72</sup> Pringle to Fairbairn, 20 May 1825, Randolph Vigne (ed.) *The South African Letters of Thomas Pringle* (Cape Town: Van Riebeeck Society, 2011), p. 184.

<sup>73</sup> Pringle to Henry Brougham, 18 and 20 Dec. 1824, *Letters of Thomas Pringle*, pp. 150–1.

public opinion. Consolidated in the session of 1827, when the matter first gained prominence in Britain, it would prove significant to the success of Philip's famous 1828 *Researches in South Africa*,<sup>74</sup> the passage of Ordinance 50, the 'Magna Carta of the Hottentots' in the same year, and ultimately to the report of the *Select Committee on Aborigines (British Settlements)* a decade later.<sup>75</sup> Put simply, when Edwards took his place in the Cape's political disputes of 1823–1824 the cause of the Khoekhoen did not yet have the resonance with influential British voices of reform that the question of slavery enjoyed. As such, it did not have the same propagandistic utility for a man in Edwards's circumstances. Placing Edwards at the centre of an investigation of imperial reform practices inevitably puts a particular slant on the different elements that made up the broad trends of the whole. The lack of emphasis in this book on missionary and indigenous issues, therefore, is yet another reminder that in understanding these trends, it is not only worth taking a closer view of a variety of shifts in public opinion but also keeping in mind the texture of and distinctions between individual lobbying and tactics.

### **'Salutary terror': Reforming the penal colonies**

In the transformation of the early nineteenth-century British empire, the Cape presented the problem of a freshly conquered colony to which large numbers of British were being actively encouraged to emigrate. These new settlers quickly began protesting that foreign systems of law and governance violated their perceived hereditary rights and privileges as 'free-born Englishmen'. In the Australian colonies, protests couched in exactly the same language were prompted by the problems of a very different context. The Australian colonies presented distinct but analogous

<sup>74</sup> J. Philip, *Researches in South Africa, Illustrating the Civil, Moral, and Religious Condition of the Native Tribes*, 2 vols. (London: James Duncan, 1828). A damning indictment of the destruction of indigenous society by ungodly practices in colonisation, it would spark off a nineteenth-century 'History War' over the question of frontier relations perhaps even more bitter (because closer in time to events themselves) than the one that would convulse Australian public debate in the late twentieth century: see R. Ross, 'Donald Moodie and the origins of South African historiography', in R. Ross (ed.), *Beyond the Pale: Essays in the History of Colonial South Africa* (Witwatersrand University Press, 1993), pp. 192–212; A. Bank, 'The Great Debate and the origins of South African historiography', *Journal of African History*, 38 (1997), 261–81. On Australia, see S. Macintyre and A. Clark (eds.), *The History Wars*, new edn (Melbourne University Press, 2004).

<sup>75</sup> Elbourne, *Blood Ground*, pp. 245–6. On the reforming network lobby created by Philip and Buxton in the 1820s and 1830s, see Laidlaw, *Colonial Connections*, pp. 146–54, and Lester and Dussart, *Colonization and the Origins of Humanitarian Governance*, pp. 78–86.

challenges in reconciling similar assertions of constitutional rights with the disciplinary needs of the transportation system. How were notions of the British rule of law to operate in a penal colony?

These questions lay at the heart of the sequential Commissions of Inquiry held across the 1820s in an effort to bring forth new administrative regimes in New South Wales, Van Diemen's Land and the Cape Colony.<sup>76</sup> Although historians are beginning to place imperial investigations such as these in the same analytical frame, they have traditionally been separated by a nationally bounded scholarship.<sup>77</sup> The transformative significance of the Commissions of Inquiry of the 1820s is well recognised in the historiographies of both South Africa and Australia, but narratives differ very considerably in popular (and even to an extent in academic) registers.<sup>78</sup> Understanding why this is so is a useful route into understanding the differences and similarities presented by the colonial societies in which Edwards operated.

In 1989, historian Jeff Peires's astute account of 'The British and the Cape' argued that the 'personality-minded historians of South Africa' had failed to recognise the significance of 'one of the biggest upheavals which Cape society ever experienced'. Scholars had been 'misled', he claimed, by the commissioners themselves, men who 'consciously de-emphasised their own personalities, and deliberately presented themselves as faceless and impartial servants of the British Crown'.<sup>79</sup> Historians have placed

<sup>76</sup> *Report of the Commissioner of Inquiry into the State of New South Wales* [BPP, 1822 (448)]; *Report of the Commissioner of Inquiry, on the judicial establishments of New South Wales, and Van Diemen's Land* [BPP, 1823 (33)]; *Report of the Commissioner of Inquiry on Agriculture and Trade in New South Wales* [BPP, 1823 (136)]. The key Cape volume of reference here is *Cape of Good Hope: Reports of the Commissioners of Inquiry; I. Upon the Administration of the Government of the Cape of Good Hope; II. Upon the Finances of the Cape of Good Hope* [BPP, 1826–7 (282)].

<sup>77</sup> In particular, Laidlaw, 'Investigating empire', 749–68.

<sup>78</sup> Bennett, 'The day of retribution', 85–106; J. Ritchie, *Punishment and Profit: The Reports of Commissioner John Bigge on the Colonies of New South Wales and Van Diemen's Land 1822–1823 ~ Their Origins, Nature and Significance* (Melbourne: Heinemann, 1970). As befit the nationally focussed Australian historiography of the 1970s, little attempt was made to see connections between Bigge's investigations in that country and his later role in the Commission of Eastern Inquiry. There are no studies devoted particularly to Bigge in South Africa, although the Commission of Eastern Inquiry has a prominent place in histories on this period.

<sup>79</sup> Pieres, 'British and the Cape', 495. Although considerable attention has subsequently been paid to the Commission itself and to its recommendations, Peires's assertions are perhaps still confirmed by a glance into two recent survey histories. The 2010 *Cambridge History of South Africa* (C. Hamilton, B. K. Mbenga and R. Ross (eds.), Cambridge University Press), vol. 1, although it certainly cannot be accused of underestimating the significance of the bureaucratic changes of this period, does not mention any of the commissioners by name; nor does it include the Commission in the index: see M. Legassick and R. Ross, 'From slave economy to settler capitalism: The Cape Colony

the ‘upheaval’ in South Africa that followed Bigge’s and Colebrook’s Commission within a liberalising and reforming framework, for all that it was cast in the mould of fundamentally racialised imperial interests.

In Australia these same interests have been viewed in a very different register and the contrast with how Bigge is remembered there – indeed, the fact that he is remembered at all – is profound. Far from being a faceless bureaucrat, in Australia Bigge occupies ‘a pre-eminent place in the annals of Australian infamy’.<sup>80</sup> He is the man who ended the egalitarian rule of Lachlan Macquarie (1810–1821) the governor who, in this version of events, was ‘The Father of Australia’ and one of the earliest embodiments of the national values of a ‘fair go’ for all.<sup>81</sup> Macquarie looms large in the popular imagination. His name is affixed to landmarks and institutions country-wide, and his extravagant building projects (whose cost was so deplored by Bigge) still dominate what survives of Sydney’s colonial townscape. Macquarie’s downfall at the hands of an alliance of imperial bureaucrats and ambitious colonial ‘exclusives’ is still mourned, and Bigge easily fits the bill of villain. The ‘Bigge reports’ – that is, the three reports of Bigge’s first Commission of Inquiry – rate a chapter in Martin Crotty and David Andrew Roberts’s 2009 collection *Turning Points in Australian History*. Here they are cast in a provocative essay by Raymond Evans as an imperial hatchet-job on colonial egalitarianism and ‘a decisive break in the erratic evolution of Australian colonial society towards democracy’.<sup>82</sup> A few months before Australia celebrated the 200th anniversary of Macquarie’s assumption of office, the New South Wales Annual History Lecture was delivered by the then chief justice of New South Wales on ‘The Macquarie Bicentennial: A Reappraisal of the Bigge Reports’. It is impossible to think of a high-profile public lecture in South Africa being devoted to the same subject, nor to there

and its extensions 1800–1854’ in that collection. In the *Cambridge History of Australia* (A. Bashford and S. Macintyre (eds.), 2013), both Bigge and his Commission appear as (multiple) index entries. Exhaustive survey volumes such as these are inevitably faced with vexed choices as to what to include and emphasise. My point is not to praise one choice above the other but to indicate that popular knowledge about Bigge and his Commissions loom so much larger in Australia than they do in South Africa that it would have been difficult for the editors of either volume to do otherwise than make the choices they did.

<sup>80</sup> J. J. Spigelman, ‘The Macquarie Bicentennial: A reappraisal of the Bigge reports’. History Council of New South Wales Annual History Lecture 2009 (Sydney: History Council New South Wales, 2009), p. 5.

<sup>81</sup> Both phrases are to be found in publicity material for *Lachlan Macquarie: The Father of Australia* (Ronin Films, 2010), <http://www.roninfilms.com.au/feature/6093/lachlan-macquarie-father-of-australia.html>, viewed 17 Jan. 2014.

<sup>82</sup> R. Evans, ‘19 June 1822: Creating “an object of real terror” ~ The tabling of the first Bigge Report’, in M. Crotty and D. A. Roberts (eds.), *Turning Points in Australian History* (University of New South Wales Press, 2009), p. 61.

being sufficient foreknowledge amongst the audience for it to be framed as a 'reappraisal'. There are of course a number of reasons for this, of which the far more recognisably postcolonial situation of South Africa after apartheid is perhaps the most obvious. British imperial governors, and even less, obscure bureaucrats, do not rate highly in national commemoration there. In Australia, where power remains concentrated in the hands of the descendants of European emigrants (convicts amongst them), the political imperatives of public commemoration are unsurprisingly different. But Bigge's greater visibility in Australian compared with South African memory and historiography also points us to important differences in the intention, content and consequences of his original reports.

In understanding the motives behind the Bigge Commission of Inquiry in Australia, we must start with the same British circumstances that had seen emigrants like Pringle and family arrive in the Cape amongst the 1820 settlers. The social upheaval at the end of the Napoleonic Wars saw a dramatic rise in convict transportation. In the six years after 1815 the free emigrant population of New South Wales more than doubled also, from 12 911 to 29 783.<sup>83</sup> It is worth remembering how much smaller the Australian settlement still was than the Cape in this period, the non-indigenous Cape population being almost double that of New South Wales at around 75 000. Bigge arrived in Sydney on 26 September 1819, coincidentally a month after the Peterloo Massacre. His instructions from the secretary of state included the warning that by 'ill considered Compassion for Convicts . . . their Situation in New South Wales be divested of all Salutary Terror'. If so:

Transportation cannot operate as an effectual example on the Community at large, and as a proper punishment for those Crimes against the Commission of which His Majesty's Subjects have a right to claim protection, nor as an adequate Commutation for the utmost Rigour of the Law.<sup>84</sup>

This emphasis on 'salutary terror' was taken up by Commissioner Bigge in his investiture speech upon arrival and has garnered the most attention in historical assessments of his reports.<sup>85</sup>

<sup>83</sup> G. Karskens, 'The early colonial presence 1788–1822', in A. Bashford and S. Macintyre (eds.), *Cambridge History of Australia* (Cambridge University Press, 2013), vol. I, pp. 116–18. Indigenous population levels are far harder to calculate. Numbers had declined substantially by the 1820s although Aboriginal people remained a significant and visible presence in the public spaces of central Sydney, at least until the middle of the decade.

<sup>84</sup> Bathurst to Bigge, 6 Jan. 1819, *HRA*, 1:10, pp. 7–8.

<sup>85</sup> Spigelmann, 'Reappraisal', 5, 12.

Macquarie considered the Australian colonies to be places of ‘reclamation as well as punishment’ and he sought to balance the needs of former convicts (emancipists) with those who were dubbed the ‘exclusives’ – free settlers who considered that political rights and socio-economic advantage should remain restricted to their ranks. Yet at the time of Bigge’s arrival in the Australian colonies, these free settlers were overwhelmingly outnumbered by convicts and their descendants, a group that also controlled about half the wealth in New South Wales and had grown in confidence under Macquarie’s patronage.<sup>86</sup> As with the Cape, the colony of New South Wales was highly centralised. In 1821 around 94 per cent of the colony’s population, 97 per cent of its cultivated land and more than 70 per cent of its livestock were located within a 70-kilometre radius of the town of Sydney.<sup>87</sup>

The key outcomes of the Bigge reports on New South Wales and Van Diemen’s Land, tabled before the British Parliament in 1822 and 1823, were a reduction in public spending, a tightening up on the severity of convict punishment, a restriction on the rights and social opportunities of former convict ‘emancipists’ and a corresponding expansion in the horizons of their rivals, the free settlers. The central premise, in the phrase of historian John Ritchie, was to connect ‘punishment and profit’.<sup>88</sup> As I discuss at length in the final chapter of this book, regulation and surveillance over convicts were substantially increased. Large-scale agriculture and pastoralism would be encouraged by preferential import duties, the provision of land and the assignment of convict labour. This new elite would also gain preferential access to land, patronage and political rights.

By the time Governor Ralph Darling arrived in New South Wales in 1825, migrants and emancipists constituted some 45 per cent of a population of 36 366.<sup>89</sup> Under Bigge’s recommendations, convicts would be removed from the pernicious influence of vice-ridden towns and redistributed to the redemptive isolation of frontier districts. As pastoralism began spreading over increasing areas of prime hunting land, consequences for the Indigenous people of this massive expansion in the colony’s economy and geographical extent would be catastrophic. Heightened frontier warfare was paralleled by increased coercion and disciplinary violence against perceived convict troublemakers. These individuals were to be removed from the settlement itself and consigned to newly established (or re-established in the case of Norfolk Island) sites of

<sup>86</sup> S. Macintyre, *Concise History of Australia* (Cambridge University Press, 1999), pp. 50–1.

<sup>87</sup> L. Ford and D. A. Roberts, ‘Expansion 1820–1850’, in A. Bashford and S. Macintyre (eds.), *Cambridge History of Australia* (Cambridge University Press, 2013), vol. I, p. 122.

<sup>88</sup> Ritchie, *Punishment and Profit*. <sup>89</sup> Fletcher, *Ralph Darling*, p. 80.

'secondary punishment'. Far from increasing social order, many of these initiatives instead exacerbated resistance from convicts and Indigenous people while the growing geographical extent of the colonies stretched disciplinary measures to the limit.<sup>90</sup> Such developments would have a direct impact upon the life and ultimately death of William Edwards once he returned to New South Wales in 1824.

Yet, for all the 'terror', both intended and unintended, that they unleashed, Bigge's recommendations also contained the seeds for far greater colonial rights in the future. Nor, for all the disciplinary thrust of the reports, would these rights ultimately be confined to those who had come to the colonies as free men. In both the Australian and Cape colonies, the recommendations of the Commissions of Inquiry established new supreme courts, restrictions on the executive power of governors and greater legislative responsibility. Such measures were not intended to favour settler autonomy, but to reassert a centralised *metropolitan* control over unlicensed gubernatorial despotism on the periphery. Yet these very provisions paradoxically opened up spaces for constitutional developments in the following decade that would see greater colonial legislative and judicial responsibility. The New South Wales Act of 1823, a direct consequence of Bigge's recommendations, ended gubernatorial despotism by establishing an appointed legislative council and a supreme court. Significantly for a colony run as a penal settlement, it required that the chief justice certify that any proposed legislation was not 'repugnant to English law'. It also raised the possibility of locally overriding the operation of English laws if they were deemed in contradiction to the particular – or as many said, peculiar – context of the colony. These arrangements gave the courts in New South Wales 'the power to nullify government policy on the basis of their interpretation of colonial circumstances',<sup>91</sup> a political influence far in advance of that exerted by the courts in England itself, and they could become a powerful force for pushing governance in a more liberal direction.

The governor most directly affected by these changes in the constitution of New South Wales would be Ralph Darling, arguably another unfortunate choice for a time of administrative transition. Although from a very different social background to that of Lord Charles Somerset at the Cape, Darling [Figure 3] bore some similarities to his aristocratic counterpart. In their defence, both men were put under considerable strain by relentless factional opposition, but neither would be well served

<sup>90</sup> Ford and Roberts, 'Expansion', 124–8.

<sup>91</sup> D. Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991), p. 87.





Figure 3 Ralph Darling in 1825, the year he became governor of New South Wales.

by their inflexible impatience with local protests against alleged gubernatorial despotism. In Darling's case this related to his insistence that New South Wales was a penal colony in which the 'free institutions of Great Britain' were 'extremely inapplicable to the inhabitants of New South Wales though born in England'. In a sentiment that Somerset might have



echoed at the Cape in relation to the new Whig and Radical arrivals, Darling concluded that 'the evil of this place is the passion which exists that New South Wales should be the counterpart of England'.<sup>92</sup>

They may have had similar political allegiances, but Somerset and Darling were operating in extremely different constitutional circumstances and with very different men at the helm of their judiciaries. The Cape was a conquered colony and, until the recommendations of the Commission of Eastern Inquiry took effect in 1828, it remained under a Roman-Dutch legal system – with Somerset's close ally Johannes Andreas Truter as president of the Council of Justice. In tactical terms it would have made more sense, at least in London's eyes, for Somerset to have anticipated the reforms that were clearly coming by exercising his authority in a less dogmatic and more flexible way. Technically, however, he generally operated within the confines of the law in some of the less politically astute decisions we will see him make across the chapters that follow. The administrative overhaul at the Cape would come only after the end of Somerset's tenure as governor. For Darling, however, the constitutional landscape had already changed. The Commission of Inquiry into the Australian colonies predated that into the Cape, and the New South Wales Act of 1823 that resulted placed Darling in a far less secure position than Somerset with regard to their shared assumptions about the proper operation of colonial governance. One stark example of particular relevance to the case of William Edwards is in the battles that both governors fought against a newly independent colonial press, established in New South Wales and the Cape Colony in the same year, 1824.

New South Wales and Van Diemen's Land were judged to be colonies of settlement rather than conquest, an idea now widely notorious in its dismissal of rights held by Indigenous Australians. In relation to questions of sovereignty, the two Australian colonies were considered 'uninhabited' prior to European arrival. This meant very different legal parameters to those of the Cape. As Blackstone's *Commentaries on the Laws of England* expressed it, 'if an uninhabited colony be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force'.<sup>93</sup> The presence of convicts and former convicts in the colony nevertheless profoundly complicated this assumption. The legal paradox presented by the penal system in the Australian colonies was evident almost from the

<sup>92</sup> Darling to Hay, 9 Feb. 1827 (secret and confidential), *HRA*, 1:13, p. 99.

<sup>93</sup> W. Blackstone, *Commentaries on the Laws of England*, first published 1765; facs. of 9th edn, 1783 (New York & London: Garland, 1978), vol. I, p. 107; Neal, *Rule of Law*, p. xii.

start. Within months of the British occupation of New South Wales in 1788, two convicts successfully brought a civil action against the master of the *Alexander* for the recovery of their missing luggage. Henry and Susannah Kable had both been sentenced to hang. As such, according to the British legal doctrine of ‘felony attain’, they were immediately dead in law. They could not give evidence or sue in court, and their goods were forfeit to the Crown. David Collins (a marine officer acting as judge-advocate of the fledgling colony) ignored felony attain, however, and the court awarded the Kables £15 for the loss of their goods. From the very outset, therefore, convicts had rights in New South Wales that they did not possess under English law. The eventual reconciliation of English law and colonial practice would unfold through two decades of controversy in the wake of the Bigge reforms.<sup>94</sup>

Its ‘character as a Penal Settlement’, as James Stephen of the Colonial Office put it in 1828, was the ‘great anomaly in the condition of this Colony’.<sup>95</sup> Blackstone’s comments on the legal ‘birthright’ of ‘English subjects’ had a crucial caveat: ‘But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony’.<sup>96</sup> How then, should this ‘situation’ be defined? And at what moment did a colony’s ‘infancy’ end and this ‘planting’ be said to have occurred? For the new chief justice, Francis Forbes, this transition was confirmed by the New South Wales Act of 1823, and Forbes would do all he could to hold Governor Darling to his own interpretation of these new constitutional parameters. This ushered in a period of profound conflict in the relationship between, and the disputed powers of, the executive and judiciary.<sup>97</sup> If the rights of convicts and of former convicts were by no means supported by the judicial reorganisation that followed the Bigge Commission, it nonetheless opened up

<sup>94</sup> B. Kercher, *An Unruly Child: A History of Law in Australia* (Sydney: Allan & Unwin, 1995), pp. 22–3, 36–8; also Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Sydney: Federation Press, 1996).

<sup>95</sup> J. Stephen, annotated commentary on amendments to the New South Wales Act of 1823, TNA, CO 201/195 Offices: House of Commons, Admiralty, Crown Agents, King’s Agent, Commander-in-Chief, Board of Trade, East India Company, Foreign, Home and Law Officers.

<sup>96</sup> Blackstone, *Commentaries*, vol. I, p. 107.

<sup>97</sup> C. H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Sydney: Angus & Robertson, 1968); Fletcher, *Ralph Darling*; Brendan Edgeworth, ‘Defamation law and the emergence of a critical press in colonial New South Wales 1824–1831’, *Australian Journal of Law and Society*, 6 (1990–1991), 50–82; J. M. Bennett, *Sir Francis Forbes: First Chief Justice of New South Wales 1823–1837* (Sydney: Federation Press, 2001); L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard University Press, 2010).

possibilities for a free society that would ultimately benefit far more than just the 'exclusives'. In the short term, these constitutional problems led to inconsistencies in authority and governance that would be ruthlessly exploited by William Edwards and his political allies, particularly those within the colonial press.

The distinct circumstances of the Cape and the Australian colonies that Edwards encountered necessitated variation in the content and emphasis of the imperial Commissions of Inquiry, one reason why they have been viewed so differently by historians and in popular memory. Yet they were not fundamentally contradictory. Ordered by the same secretary of state and led by the same individual, they were also part of the same metropolitan mindset and representative of the shift in thinking on imperial governance in this period. The Commissions were the instruments of broader forces of transformation, at once liberal and disciplinary. It was these forces with which Edwards was to contend as he embarked upon his unconventional career as a colonial reformer.